United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7120

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSE CORDOVA and AMELIA CORDOVA, individually and as next friend of HECTOR TORRES, a minor, and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

-vs-

JAMES REED, as Commissioner of the Department of Social Services of the County of Monroe, and on behalf of all other commissioners of local departments of social services in the State of New York, and ABE LAVINE, as Commissioner of the Department of Social Services of the State of New York,

Defendants-Appellees.

PLAINTIFFS-APPELLANTS'
REPLY BRIEF

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INTRODUCTION

An application for public assistance for the minor plaintiff, Hector Torres, was denied under section 382 of the New York Social Services Law since he had come to New York to live with his aunt and uncle and they were responsible to support him under that statute.* Their civil rights action challenging the constitutionality of section 382 was dismissed by Judge Burke in the Western District of New York. He declined to convene a three-judge court and held that the plaintiffs had to exhaust state judicial and administrative remedies (Appendix at 41-42). Most of the points urged by the defendants below and the rulings by Judge Burke have in effect been conceded to be wrong.

Commissioner Lavine no longer seriously argues that the claim that section 382 violates equal protection and the right to travel is not a substantial constitutional question which would have to be determined by a three-judge

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* Application was made solely for the boy, not for the entire family (Complaint, ¶12 (Appendix at 8)). The defendant Reed has admitted this (Reed brief, p. 3; Reed answer, ¶Fifth (Appendix at 33)), and since the defendant Lavine has moved to dismiss the allegations of the complaint must be treated as correct. Whether or not the entire family is eligible for public assistance (Lavine brief, p. 4) is irrelevant. Plainly if section 382 is unconstitutional the Cordovas have no obligation to support the boy, so he would be eligible for a single person grant plus a pro-rata share of the rent as a minor eligible for AFDC residing with a non-legally responsible relative. 18 N.Y.C.R.R. 352.2(b) and 352.3(c).

court (His only reference to this being an unelaborated comment to the contrary buried in a footnote in his brief (p.12)). Indeed, he is not only unable to controvert the cases relied on by the plaintiffs but assumes in his abstention argument that a three-judge court was required all along (Lavine brief, pp. 11-13). Rather than continuing to argue that state judicial remedies should have been exhausted the defendant Lavine now asserts that this Court should order abstention.* Finally, the state commissioner continues to insist that administrative remedies must be exhausted, casting his argument in the guise of his not being a proper party.

The defendants have not, as they cannot, shown that abstention would be proper, or is properly before this Court, and they have not refuted the point that exhaustion of administrative remedies is not required before the plaintiffs' claims based solely on constitutional grounds can be determined by the district court.

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* While that ground appears nowhere in the Appendix, it was urged as a separate point from exhaustion of judicial remedies in the defendants' joint memorandum of law in the court below (p. 3). Plainly Judge Burke did not order abstention; if he had he would have said so.

ARGUMENT

POINT I

ABSTENTION WOULD NOT BE PROPER IN ANY EVENT AND NEITHER THE SINGLE JUDGE BELOW NOR THIS COURT COULD DETERMINE TO ABSTAIN

Having asserted in an affidavit of counsel in this Court that assistance was denied under section 382 "on the grounds that any person bringing a child into New York is responsible for that child's support" (Affidavit of David L. Birch, Esq., dated March 20, 1975), Commissioner Lavine, who is charged with administering that very statute asserts that its meaning is "far from clear." (Lavine brief, p.20). That contention flies in the face of the plain language of the statute, and the opinion of at least one state court judge that the statute means exactly what the plaintiffs and the defendant Reed say it means. See In re Paul and Mark, 315 N.Y.S. 2d 12, 64 Misc. 2d 382 (Fam. Ct. N.Y. Co. 1970). The law is a vestigial remnant of the old poor laws relating to settlements which were designed to keep the poor from moving into other jurisdictions, with relatives or otherwise. As the Court stated in Paul and Mark, supra:

> The Social Services Law is replete with provisions derived from ancient and archaic Poor Laws that were intended to deprive indigent persons of the freedom to travel. *** The section providing that any person who brings or causes a child to be brought into the State who

> does not have State residence shall have responsibility for the child during the child's minority and thereafter until he is self supporting [section 382.1, the section involved here] remains on the books despite all court decisions on the constitutional right of freedom to travel (64 Misc. 2d at 389).

The abstention argument now advanced by the state commissioner is also wholly at odds with his position in the District Court about what this statute means; there he asserted:

> A reading of the statute clearly indicates that it is a support statute and fixes responsibility for the support of a minor out of state child.

Defendants' Memorandum of Law in Opposition of [sic] Temporary Restraining Order and Three Judge Court, filed jointly by both defendants, p. 4. The argument by the state commissioner that the statute might not apply to a "close relative" (Lavine brief, p. 15), flies in the face of the assertion made earlier to this Court in the affidavit of David L. Birch, Esq., dated March 20, 1975, that

> Hector has two legal sources of support, his mother and the Cordovas themselves (p. 4).

That affidavit further stated that the boy

> has a legal source of support, the Cordovas. The state has provided a source for Hector's support in the statutory scheme outlined in the Social Welfare Law, §382 (Id., p. 5).

Judge Burke adopted the same reading of the statute, stating in his decision "The statute under attack is a support statute and fixes responsibility for the support of a minor out of state child." (Appendix at 41).

All of the parties have evinced no doubt throughout this litigation as to what the statute means, and its meaning is clear on its face. As this Court has stated with regard to similar abstention arguments in civil rights cases, the objectives of the law would be defeated if the federal constitutional claims had to

> stagnate in the federal court until some nebulous or non-existent remedy was pursued like a will-o'-the-wisp in the state court.

Wright v. McMann, 387 F.2d 519, 525 (2d Cir. 1967).

This is not a case where the plaintiffs have raised any pendent state laws or claims, unlike Railroad Commission of Texas v. Pullman Company, 312 U.S. 496 (1941) where it was not clear that the challenged regulation was within the power of the Railroad Commission to promulgate. In Brown v. First National City Bank, 503 F.2d 114 (2d Cir. 1974), the federal courts were, in effect, being asked to decide an issue solely of state law, with no constitutional overtones at all, since the federal statutes (the National Banking Act) "had no independent operation and only state law questions were presented." (503 F.2d at 117). Nor in this case like Blouin v. Dembitz, 489 F.2d 488 (2d Cir. 1973), where the plaintiffs contended

that the defendant state judges "had deviated from New York Law" (489 F.2d at 489) Here the problem is that the law has been followed. Nor does Freda v. Lavine, 494 F.2d 107 (2d Cir. 1974) support the defendants' abstention argument, since there there were conflicting decisions in the state courts; here there are none. Moreover, in Freda this Court pointed out that

> Abstention will not impose any additional expense on plaintiff. Plaintiff need not institute an independent action in state court. Others have already commenced state suits raising the same claims (494 F.2d at 110).

See also Reid v. Board of Education, 453 F.2d 238, 243 n.9 (2d Cir. 1972) where state cases were also pending.* Likewise in Reid the Court was faced with such opaque state law terms as "suitable education facilities," and "such special classes as may be necessary to provide instruction adapted to the mental attainment and physical conditions of such children" (453 F.2d at 240), and a system involving quite complex evaluations (453 F.2d at 243). That is a far cry from the clear-cut statute challenged here.

Finally, the state commissioner's contention that his abstention argument is properly before this Court is

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* Of course, as in Reid, dismissal on abstention grounds, as opposed to retention of jurisdiction, would not be proper in any event (453 F.2d at 244).

without merit. Plainly the Supreme Court could consider the state commissioner's abstention argument on appeal from a three-judge court decision, just as it did hardly more than three months ago in Harris County Commissioners Court v. Moore, 95 S.Ct. 870 (1975). A comparison of that case with MTM, Inc. v. Baxley, 95 S.Ct. 1278 (1975), reveals an important distinction which the commissioner glosses over. In Harris County Commissioners the defendant was allowed to argue in the Supreme Court that the District Court should have abstained under Pullman abstention. That is exactly the same posture in which the commissioner here would be if his abstention argument were rejected.

MTM, on the other hand, involved a different sort of abstention, under Younger v. Harris, 401 U.S. 37 (1971), based on the pendency of criminal proceedings against the federal plaintiff in the state courts, and the Supreme Court expressly did not decide whether Pullman abstention, the sort here urged by the state commissioner, would be appealable directly to the Supreme Court (95 S.Ct. at 1280 n.7). Indeed, as the Court pointed out there, just the prior Term it had indicated that unless the prayer for injunctive relief requiring a three-judge court had been abandoned, the Court of Appeals would not have jurisdiction to hear an appeal since the abstention issue could only be determined by the three-judge court. Steffel v. Thompson, 415 U.S. 452, 457 n.7 (1974). Suffice it to say the plaintiffs have not abandoned

their three-judge court claims.

Until the Supreme Court holds to the contrary, the law still is that an appeal on the basis of Pullman abstention lies in the Supreme Court, rather than this Court, and such appeal must be from a three-judge court, not a single judge.

POINT II

EXHAUSTION OF ADMINISTRATIVE REMEDIES WAS NOT REQUIRED AND HAS NO BEARING ON THE ROLE OF THE STATE COMMISSIONER AS A PARTY DEFENDANT

The defendants have not controverted any of the authorities cited by the plaintiffs for the proposition that where a three-judge court is required, exhaustion of administrative remedies is not required. Nor does the state defendant deny that, as stated in Eisen v. Eastman, 421 F.2d 560, 569 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970), "the [state] relief agency could not declare the state statute unconstitutional." Nor do they dispute that the vitality of even the partial restrictions of Eisen has been seriously eroded.*

Unlike Hagans v. Wyman, 462 F.2d 928 (2d Cir. 1972), this is not a case involving regulations of the state commissioner, which he might ameliorate, but a state statute which the commissioner is bound to enforce. N.Y. Social Services Law, section 34.3(e). Moreover, the limited deferral to state proceedings in Hagans was in the context of a challenge based on conflict with federal laws and regulations,

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* Since the filing of the appellants' brief another Court of Appeals has held, en banc, that actions under 42 U.S.C. section 1983 do not require exhaustion of administrative remedies. McCray v. Burrell, 43 U.S.L.W. 4447 (4th Cir. Apr. 10, 1975).

not like the solely constitutional claims here.*

The fact is also that the state commissioner is responsible for supervision of all local commissioners, including the defendant Reed, under section 34.3(d) of the Social Services Law, and likewise the local commissioners, including the defendant Reed, are simply agents of the state commissioner, a fact admitted by the defendant Reed and which must be deemed admitted on the motion to dismiss of the defendant state commissioner. (Complaint ¶5 (Appendix at 6); Reed answer, ¶ Third (Appendix at 32)). As the courts have explained the relationships of these very two defendants, who are thus collaterally estopped on this point,

> the local county welfare agency and the State Department of Social Services are part of the same administrative agency, whose chief administrative officer is the respondent [state] Commissioner. (Social Services Law, §§20, 34). From any view, the conglomerate Federal and State statutes ... conceptually provide for a "single State agency" in which the local agency and its director act as the agent of the

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* While none of the plaintiffs in Hagans had an administrative hearing, the state commissioner was not dropped as a party. (462 F.2d at 931). Cf. Boone v. Wyman, 295 F.Supp. 1143, 1151 (S.D.N.Y. 1969), aff'd 412 F.2d 557 (2d Cir. 1969), cert. denied. 396 U.S. 1024 (1970). Even in Hagans all that was required was a brief pause in the federal litigation for fair hearings to be held rather than dismissal (462 F.2d at 931).

> State Department in all matters relating to assistance and care administered by local officials. (Emphasis supplied).

Reed v. New York State Department of Social Services, 354 N.Y.S. 2d 389, 78 Misc. 2d 266, 270 (Sup. Ct. Monroe Co. 1974). Thus this case is no different from all of the other welfare cases brought under section 1983 in which exhaustion of state administrative remedies was not required. See, e.g., Carter v. Stanton, 405 U.S. 669 (1972); King v. Smith, 392 U.S. 309 (1968); Damico v. California, 389 U.S. 416 (1967).

New York operates a unified public assistance plan and the defendant state commissioner is a proper party absent administrative exhaustion which is not required in this three-judge court case under 42 U.S.C. section 1983.

CONCLUSION

For the foregoing reasons the judgment below should be reversed and the case remanded to the District Court for the convening of a three-judge court to further determine the case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 1975, I served the foregoing reply brief upon counsel for the appellees, Frank P. Celona, Esq., Department of Social Services, 111 Westfall Road, Rochester, New York 14620, and Hon. Louis J. Lefkowitz, Attn: David L. Birch, Esq., Deputy Assistant Attorney General, Two World Trade Center, New York, New York 10047, by causing copies to be mailed, postage prepaid, to them.

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